

## 48A C.J.S. Judges § 236

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### B. Waiver of Disqualification

##### 1. In General

## § 236. Generally

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  52, 53

### The right to have a judge disqualified may generally be waived.

The right to have a judge disqualified may generally be waived.<sup>1</sup> Thus, a defendant in a criminal case may waive the right to have a judge disqualified<sup>2</sup> for whatever reason the defendant may have.<sup>3</sup> A finding of waiver depends upon the facts and circumstances present in each particular case.<sup>4</sup>

The determination of whether or not the disqualification of a judge can be waived rests largely on the language of the constitutional and statutory provisions involved or on the nature of the disqualification.<sup>5</sup> In this regard, the objection to a disqualified judge may be waived if the act of the disqualified judge is considered as being voidable rather than absolutely void.<sup>6</sup> Waiver of a judge's disqualification may also be permitted where there is no absolute constitutional or statutory prohibition against a disqualified judge sitting in the case or where the constitution or a statute permits such a judge to sit with the consent of the parties.<sup>7</sup>

On the other hand, some appearances of impropriety are so compelling that they can never be waived or deemed harmless.<sup>8</sup> For instance, there can be no waiver of the right to disqualify a judge if the disqualification is based on an absolute prohibition in the constitution or in a statute or court rule against a disqualified judge sitting in the case<sup>9</sup> since such prohibition affects the jurisdiction of the court.<sup>10</sup> Any judgment rendered by such a judge is void, without effect, and subject to collateral attack.<sup>11</sup> Also, there can be no waiver of the disqualification of a judge if the acts of the disqualified judge are absolutely void or without jurisdiction.<sup>12</sup>

If a party takes action constituting the waiver of the right to peremptorily disqualify a judge in an original action, and a refiled suit is found to be a continuation of the original action, then the waiver from the original action extends to the later action.<sup>13</sup>

***Opportunity for waiver.***

Before a party can be said to have waived the right to have a judge disqualified, the party must first have had an opportunity to exercise it.<sup>14</sup> Thus, there is no waiver of the right to have a judge disqualified where the petitioner does not know who the trial judge is to be in time to comply with waiver procedures.<sup>15</sup>

***Necessity of writing.***

Generally, a waiver need not be in writing.<sup>16</sup>

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Footnotes

- 1 Miss.—Overstreet v. State, 17 So. 3d 621 (Miss. Ct. App. 2009).  
  
Okla.—Day v. Snider, 2005 OK CIV APP 102, 125 P.3d 1229 (Div. 3 2005).  
  
**A.L.R. Library**  
Waiver or loss of right to disqualify judge by participation in proceedings—modern state criminal cases, 27 A.L.R.4th 597.
- 2 Okla.—Mitchell v. State, 2006 OK CR 20, 136 P.3d 671 (Okla. Crim. App. 2006).
- 3 Pa.—Com. v. Fields, 231 Pa. Super. 238, 331 A.2d 494 (1974).
- 4 Colo.—Johnson v. District Court In and For Jefferson County, 674 P.2d 952 (Colo. 1984).  
  
Miss.—Ryals v. Pigott, 580 So. 2d 1140 (Miss. 1990).
- 5 Tenn.—State ex rel. Roberts v. Henderson, 223 Tenn. 115, 442 S.W.2d 629 (1969).
- 6 Mo.—Prather v. Prather, 263 S.W.2d 57 (Mo. Ct. App. 1953).
- 7 Tenn.—State ex rel. Roberts v. Henderson, 223 Tenn. 115, 442 S.W.2d 629 (1969).  
  
As to consent to waiver, see §§ 243, 244.
- 8 D.C.—Scott v. U.S., 559 A.2d 745 (D.C. 1989).  
  
Ga.—Pope v. State, 257 Ga. 32, 354 S.E.2d 429 (1987).
- 9 N.D.—Matter of Estate of Risovi, 429 N.W.2d 404 (N.D. 1988).  
  
Tex.—Horn v. Gibson, 352 S.W.3d 511 (Tex. App. Fort Worth 2011), review denied, (Mar. 30, 2012).  
  
Wash.—Harbor Enterprises, Inc. v. Gunnar Gudjonsson, 116 Wash. 2d 283, 803 P.2d 798 (1991).
- 10 Tex.—Gulf Maritime Warehouse Co. v. Towers, 858 S.W.2d 556 (Tex. App. Beaumont 1993), writ denied, (Nov. 17, 1993).

**Retired judge**

The qualification of a retired judge to preside over a case is a jurisdictional issue that cannot be waived.

Tex.—*Greene v. State*, 324 S.W.3d 276 (Tex. App. Austin 2010).

11 Tex.—*Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556 (Tex. App. Beaumont 1993), writ denied, (Nov. 17, 1993).

12 Tex.—*Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621 (Tex. 2012).

13 Alaska—*Staso v. State, Dept. of Transp.*, 895 P.2d 988 (Alaska 1995).

14 Ariz.—*Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955).

**Ten day rule for exercising right to waiver**

Mont.—*In re Marriage of Peabody*, 179 Mont. 98, 586 P.2d 304 (1978).

15 Ariz.—*Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721 (1955).

16 Ga.—*Byrd v. Riggs*, 211 Ga. 493, 86 S.E.2d 285 (1955).

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